88-949

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

RICHARD O. POST, JR.,

Petitioner,

—against—

JOHN M. REGAN, JR. and
MARSH & MCLENNAN COMPANIES, INC.,

Respondents.

PETITION OF RICHARD O. POST, JR. FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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53-17

QUESTIONS PRESENTED

1. May summary judgment be granted dismissing a libel suit for failure to prove the requisite degree of fault when critical *ex parte* documentary evidence of the circumstances of the libels available only to defendants and claimed by them to negate fault is viewed *in camera* and relied upon by the court without deciding plaintiff's timely motion for discovery thereof?

2. Is a private plaintiff suing a non-media business corporation for actual damages resulting from libelous accusations of professional misconduct republished in the media, required by the First Amendment to satisfy the "actual malice" standard by showing that defendants acted in a grossly irresponsible manner?

3. May summary judgment be granted dismissing a libel suit for failure to prove "actual malice" where there is abundant evidence from which a jury might return a verdict that defendants knew of the falsity of the libels when publishing them?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings in the United States Court of Appeals for the Second Circuit (No. 88-7260) were Richard O. Post, Jr. and John M. Regan, Jr. and Marsh & McLennan Companies, Inc. John M. Regan, Jr. was at all relevant times the chairman of the Board of Directors and chief executive officer of co-defendant Marsh & McLennan Companies, Inc. Marsh & McLennan Companies, Inc. was and still is a corporation organized and existing under and by virtue of the laws of the State of Delaware.

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RICHARD O. POST, JR.,

Petitioner,

—v—

JOHN M. REGAN, JR. and
MARSH & MCLENNAN COMPANIES, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Richard O. Post, Jr. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit Court of Appeals.

OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is unreported and appears in the appendix to this petition starting at page 17a.

The district court's Memorandum of Decision and Order granting summary judgment for respondents is reported at 677 F. Supp. 203 and appears in the appendix to this petition start-

ing at page 3a. The district court's judgment appears at page 14a. The district court's certificate in accordance with Rule 54(b) appears at page 15a.

The district court's memorandum order regarding discovery and *in camera* inspection appears at 1a.

JURISDICTION

The Summary Order of the Court of Appeals was filed on June 27, 1988. On September 6, 1988, the Court of Appeals denied a petition for rehearing and suggestion for rehearing *en banc* filed by petitioner. The denial by the Court of Appeals of the petition for rehearing and suggestion for rehearing *en banc* appears at page 23a. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions here involved are Rules 26(b)(3) and 56 of the Federal Rules of Civil Procedure and U.S.C.A. Const. Amend. I, V and XIV § 1, pages 24a-27a.

STATEMENT OF THE CASE

In this diversity action filed on December 20, 1984, petitioner Richard O. Post, Jr. sues his former employer Marsh & McLennan Companies, Inc. ("MMC") and its then chairman of the board of directors, John M. Regan, Jr., ("Regan"), respondents, for libel, seeking actual, presumed and punitive damages. The libels alleged were statements concerning petitioner made by Regan on behalf of MMC at a June 8, 1984, stockholders' meeting convened to consider huge bond trading losses incurred by MMC and in conversations with news reporters immediately after that meeting.

Regan stated petitioner's employment had been terminated as a result of his involvement in the unauthorized trading activities

and that petitioner was among those who engaged in the trading and the deliberate misrepresentation and concealment thereof by falsifying company records. Petitioner had discovered and disclosed the trading activities to MMC senior management on April 5, 1984. Widespread dissemination of the libels in the media resulted in the destruction of petitioner's professional career.

Libel *per se*, simple fault, gross fault and actual malice were pleaded.

Before answer and before any document discovery, Regan's deposition in his individual capacity was taken on February 11, 1985. On that deposition Regan admitted his awareness when he spoke on June 8, 1984, that petitioner's employment had been terminated before April, 1984, for other reasons, and that he knew of no evidence tending to suggest that petitioner knew of or participated in the improper activities or their concealment.

Petitioner's June 26, 1985, Rule 34 discovery notice requested production and disclosure of any investigation reports placed before Regan regarding the bond trading affair prior to June 8, 1984. A June 6, 1984, "draft memorandum" of counsel "to files" was identified by respondents as read by Regan before he made his June 8, 1984, remarks, but its production was refused by reason of alleged attorney-client and work product privileges.

Respondents answered and MMC interposed counter-claims in June, 1985, alleging, *inter alia* that petitioner had engaged in a scheme and artifice to conceal and supress material information regarding the bond trading activities for personal gain and had violated a New York Statute prohibiting fraud, deception, and conceaiment as to the sale of securities.

Discovery proceeded and various motions pertaining thereto were decided by the district court including one by respondents for a protective order against a further deposition of Regan in his capacity as a managing agent of MMC, after answer, counter-claims and document discovery had gone forward. The

court granted respondents' motion for the stated reason that petitioner would have an opportunity to question Regan at the trial, then regarded as an event sure to take place. Post's request for judicial intervention regarding production of the June 6, 1984, investigation report was deferred to trial, which was scheduled to commence on November 4, 1987.

On June 15, 1987, the case was reassigned to a successor district judge and on August 28, 1987, respondents moved for summary judgment dismissing petitioner's complaint in its entirety. Petitioner opposed the motion for summary judgment with his own and other affidavits, many pages of depositions of reporters with whom Regan spoke on or shortly after June 8, 1984, present and former officers of MMC, the individuals most closely involved in the bond trading, public relations advisers to MMC and others, and voluminous evidence of his non-culpability in the whole affair.

In their Memorandum in Support of Summary Judgment respondents asserted that in making the allegedly libelous remarks Regan had relied in good faith upon reports of inside and outside counsel and other retained experts of their investigation of the matter. Because petitioner would have no opportunity to further interrogate Regan if the district court granted summary judgment, petitioner timely moved to compel production and discovery of such reports of counsel and for a further deposition of Regan for use in opposition to the motion, claiming that any privilege with respect to documents relied upon by Regan and contributing to his state of mind in uttering the libels had been waived under well-established principles.

Respondents opposed that motion and on October 20, 1987, the district court directed that the June 6, 1984, investigation memorandum from respondents' attorneys be submitted to the court for *in camera* inspection and at the same time and without having seen that report, denied petitioner's request for a deposition of Regan in his corporate capacity and also denied petitioner's request for documents other than the June 6, 1984, report that Regan had seen pertaining to the investigation of the bond trading losses (1a).

On January 20, 1988, without ruling on petitioner's motion for discovery of the investigation report, and without oral argument, a Memorandum Decision and Order was entered by the district court granting summary judgment dismissing the amended complaint *in toto* (3a). In its decision the court relied upon the *in camera* report describing it thus:

> Defendants have come forward with admissible evidence that the investigation and subsequent reporting were conducted in a careful, responsible manner. The investigation was conducted over a two-month period, and was not done hastily. It involved interviews of relevent parties and reviews of transactions and documents by inside and outside counsel by staff and independent accountants, as well as by senior management (12a).

Aside from what may be contained in the June 6, 1984, investigation memorandum, there is no evidence in the record of this case from which any conclusion regarding the degree of care or responsibility exercised by respondents in making the investigation or the extent to which Regan's remarks conformed to the results of same, could be derived.

Petitioner's libel claims were dismissed upon the ground that his proof had not met a requirement developed by the New York State Court of Appeals shortly after this Court's decision in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 41 L.Ed.2d 789 (1974). The New York Rule exonerated journalists covering a news story of public concern from libel responsibility unless they acted with "gross irresponsibility." The district court considered this requirement applicable to respondents because their remarks were republished in the media (11a).

The district court also relied upon a factual finding that petitioner was "charged with the responsibility of enforcing MMC's investment resolutions and complying with state laws" (12a), arrived at without mention of the enormous mass of evidence demonstrating that petitioner had been shunted aside by the two principal malefactors in the bond loss debacle, and was not so responsible. Concluding that petitioner had not shown

"gross irresponsibility" on the part of Regan or MMC "by a preponderance of the evidence" (13a) the district court dismissed the claims without trial.

THE DECISION BELOW

On appeal, the Second Circuit affirmed in an unpublished Summary Order filed on June 27, 1988 (17a).

Overlooking the undeniable fact that all of petitioner's libel counts sought actual damages, i.e. lost earnings and recovery for mental suffering, and that such damages were established by deposition testimony before the district court, the Second Circuit stated:

> Because a state may not allow recovery of presumed and punitive damages 'absent a showing of actual malice' in a defamation action where the challenged expression related to a matter of public concern [citing *Dun & Bradstreet* v. *Greenmoss Builders, Inc.*] the District Court properly dismissed Post's defamation counts alleging libel per se and simple negligence (20a).

This Court's decision in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 41 L.Ed.2d 789 (1974) holding simple fault is a sufficient constitutional basis upon which the states may constitutionally allow compensation to private individuals for actual injury caused by libels in respect of matters of public concern, was cited and argued to the Second Circuit.

Acting further on the premise that proof of actual malice was constitutionally required for petitioner to have any right to recover, the Second Circuit stated:

> Under New York law implementing the constitutional restraints reflected in the "actual malice" standard, a plaintiff may recover only if the defendants acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties. *Chapa-*

> *deau* v. *Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 199, 379 N.Y.S.2d 61, 64 (1975) (20a),

notwithstanding that the gross irresponsibility requirement as a matter of constitutional law is inapplicable to petitioner's claims for actual damages based on simple fault.

Turning its attention to the proof, the Court of Appeals found as facts, that:

> a careful and responsible investigation into the unauthorized trading affair was conducted by MMC with the aid of outside counsel and an independent accounting firm. MMC concluded that the unauthorized transactions resulted from the unethical (and perhaps criminal) conduct of a small number of its employees, coupled with inadequate supervision by those charged with that responsibility. Post fell into this latter group (21a).

This was followed with the remarkable conclusion that respondents "were not required to specify as to each discharged employee the precise degree of culpability involved" (22a), meaning that it was perfectly all right, in the Court's view, for respondents to lump petitioner whom they thought might have been an inadequate supervisor (a hotly disputed factual issue) together with the deliberate, unethical and possibly criminal wrongdoers in describing the affair to the press corps.

In so doing the Second Circuit rejected or ignored the following contentions of petitioner:

1. Petitioner and his counsel have been denied access to the investigation report of June 6, 1984. There is no other evidence from which the above remarks as to the nature, content and conclusions of MMC's investigation as to petitioner can be drawn;

2. That investigation and respondents' reliance thereon in making the libelous remarks was interposed by respondents as a basis for the granting of summary judgment;

3. The investigative report was viewed *in camera* by the district court and, there being no other evidence in the record,

must have been accepted by the district court as proof that the investigation was "careful" and "responsible";

4. Petitioner's timely motion for discovery of such investigation report—based upon the settled rule of law that where one party interposes as a defense its reliance upon the advice or work product of counsel, that advice or work product is fully discoverable and admissible and any privilege or work product defense in respect thereof is deemed to have been waived—has never been decided; and

5. Petitioner has been denied any reasonable opportunity to make use of the investigation report to add to his own proof on the issue of fault.

In summarily dealing with this investigation report, the Court of Appeals proceeded on the assumptions that (a) petitioner contended it to be privileged and (b) it was not relied upon by the district court because some other "admissible" evidence must have been relied upon (22a) and disposed of petitioner's argument regarding failure to rule on discovery of the report for use in opposing summary judgment as follows:

> Appellant's contention concerning discovery is without merit, as is his claim that the District Court relied on privileged material in dismissing the action, see 667 F.Supp. at 209 ('Defendants have come forward with *admissible* evidence that the investigation and subsequent reporting were conducted in a careful, responsible manner') (emphasis added) (22a).

Petitioner contended any privilege had been waived by respondents when they asserted their reliance upon the investigation in defense, and, as aforesaid, there was no evidence, admissible or otherwise, regarding the nature and content of the investigation, other than the secret, *ex parte*, *in camera* report.

On September 6, 1988, the Second Circuit denied a Petition for Rehearing (23a) and Suggestion for Rehearing *En Banc* (23a).

REASONS FOR GRANTING THE PETITION

This case merits the Court's review because the decision of the Second Circuit (1) in affirming the granting of summary judgment based upon *ex parte* evidence viewed *in camera* conflicts with the law of the First Circuit rejecting the granting of summary judgment based on such evidence as improper; (2) in granting summary judgment without permitting discovery of critical documentary evidence disregards decisions of this Court and Rule 56(f) of the Federal Rules of Civil Procedure; and (3) in denying petitioner his right to trial by jury of genuine issues of material fact on the basis of such evidence has deprived petitioner of his property without due process of law and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Review by this Court is further warranted because the Second Circuit disregarded the decision of this Court in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 31 L.Ed. 2d 789 (1974) in upholding summary judgment dismissing petitioner's libel claims for actual injury by erroneously imposing upon petitioner a constitutional duty to prove "actual malice".

Review is also made appropriate by the failure of the Second Circuit to follow this Court's directives that on summary judgment the evidence of the non-movant is to be believed and all justifiable inferences are to be drawn in his favor, when it upheld summary judgment for failure to show actual malice in the face of abundant evidence upon which a jury could return a verdict that respondents had actual knowledge of the falsity of their accusations as to petitioner.

ARGUMENT

I. THE SECOND CIRCUIT HAS SANCTIONED THE GRANTING OF SUMMARY JUDGMENT AND MADE ITS OWN FINDINGS OF FACT IN SUPPORT OF SAME BASED UPON *EX PARTE* EVIDENCE VIEWED *IN CAMERA*, AND HAS DEPRIVED PETITIONER OF DISCOVERY OF IMPORTANT EVIDENCE AVAILABLE ONLY TO THE MOVANT NEEDED IN ORDER TO OPPOSE SUMMARY JUDGMENT. THIS CONFLICTS WITH DECISIONS OF THIS COURT AND THE FIRST CIRCUIT AND REQUIRES EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

Summary judgment should not be granted in a case where the evidence is in the possession of the movant and the non-movant has not had a full opportunity to conduct discovery. *Anderson* v. *Liberty Lobby Inc.*, 477 U.S. 242, 91 L.Ed.2d 202, 217 (1986); Rule 56(f) Fed.R.Civ.Pro. It is even more inappropriate to grant summary judgment in a case where the evidence is in the possession of the movant and the opposing party has not had discovery thereof, and the court utilizes such *ex parte* evidence as the basis for granting summary judgment. *Bane* v. *Spencer*, 393 F.2d 108 (1st Cir. 1968), *cert denied*, 91 S.Ct. 108, 27 L.Ed.2d 105 (1970); *Association for Reduction of Violence* v. *Hall*, 734 F.2d 63 (1st Cir. 1984).

Here, the corporate and individual respondents claimed that petitioner could not show actual malice or gross irresponsibility on their part because Regan who uttered the libels, had relied in good faith upon a careful and responsible investigation conducted by inside and outside counsel and others.

The only written report of that investigation identified by respondents as seen by Regan in response to petitioner's Rule 34 request for discovery of June 26, 1985, was the memorandum of June 6, 1984, production of which was withheld by reason of claimed attorney-client and work product privileges.

Petitioner made his objection to the withholding of this memorandum known to the district court on June 12, 1986, and was advised to wait until the trial by District Judge Griesa.

Later, after reassignment to District Judge Daronco, the motion for summary judgment was made. Petitioner filed a written motion to compel discovery of the investigation memorandum which resulted in the memorandum decision of October 20, 1987 (1a) requiring production of that memorandum for *in camera* inspection. The district court received and reviewed this memorandum and its exhibits, but never decided petitioner's motion for its production.

It is fundamental that when a party injects into litigation its good faith and state of mind and relies upon a report of counsel of an investigation as justifying its conduct, that such a report must be made available, privilege or no privilege. *Hunt* v. *Blackburn*, 9 S.Ct. 125, 32 L.Ed. 488 (1888); *Transworld Airlines Inc.* v. *Hughes*, 332 F.2d 602 (2d Cir. 1964); *Kunglig Jarnvagsstyrelsen* v. *Dexter & Carpenter, Inc.*, 32 F.2d 195, 201 (2d Cir. 1929), *cert. denied*, 50 S.Ct. 32, 74 L.Ed. 629 (1929).

Regan's state of mind on June 8, 1984, is of central importance on the question of fault. This too, entitles petitioner to view the investigation memorandum. The situation is analogous to reliance of members of the press upon the confidential editorial process in media libel cases. In *Herbert* v. *Lando*, 441 U.S. 153, 60 L.Ed. 2d 115 (1979) this Court made it abundantly clear that in a libel suit there is no privilege under the First Amendment guarantee of freedom of the press that can bar the plaintiff from inquiring into the editorial process of those responsible for the publication where the inquiry will produce evidence material to the proof of a critical element of the plaintiff's cause of action, such as the degree of fault involved.

Here, not only has petitioner been denied an opportunity to inquire into the investigation report admittedly shown to respondent Regan shortly before the making of the defamatory remarks, but it is obvious that the district court, and the Second Circuit relied upon the *in camera* investigation report in making their respective findings as to the conduct of the investigation.

There is no evidence in the record other than whatever is contained in the *in camera* memorandum that could come remotely close to enabling the Court of Appeals to find:

> A careful and responsible investigation into the unauthorized trading affair was conducted by MMC with the aid of outside counsel and an independent accounting firm (21a).

Petitioner is requesting the Clerk of the Second Circuit to certify the entire record and transmit it to this Court to enable verification of the foregoing.

Who was interviewed? What did they say? What did the investigators conclude as to Post? Did Regan depart from those conclusions in his remarks? If so, in what respects? Were those conclusions negligently reached? Petitioner, we submit, is affirmatively entitled to this information.

Because the report of the investigation has been withheld from petitioner, petitioner and his counsel are reduced to guessing as to its contents. If it is true that the investigation report concluded that petitioner had inadequately supervised, petitioner is entitled to review the basis for that conclusion and to have a jury determine whether such was truly the case, and, in any event, it is for the jury to determine whether and to what extent respondents were at fault in not distinguishing between petitioner and the deliberate wrongdoers in their remarks.

Petitioner's libel claims constitute an interest in property within the meaning of the Fifth and Fourteenth Amendments. *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 71 L.Ed.2d 265 (1982); *Mullane* v. *Central Hanover Trust Co.*, 339 U.S. 306, 94 L.Ed. 865 (1950). Petitioner has been deprived of that interest without procedural due process.

Review by this Court is, accordingly, indicated.

II. REVIEW SHOULD BE GRANTED BECAUSE THE SECOND CIRCUIT APPLIED THE WRONG CONSTITUTIONAL STANDARD IN UPHOLDING DISMISSAL OF PETITIONER'S LIBEL CLAIMS SEEKING DAMAGES FOR ACTUAL INJURY.

The libels sued upon concern fraud, concealment, professional incompetence and resulting termination of employment having to do with claimed improprieties in the investment of a business corporation's cash. The Second Circuit held these libels to have "undoubtedly addressed a matter of 'public concern' sufficient to trigger heightened constitutional protections" (20a).

Then the Second Circuit correctly stated the proposition of constitutional law that a state may not allow recovery of presumed and punitive damages absent a showing of actual malice in such a situation (20a).

However, the Second Circuit went on to uphold dismissal of petitioner's defamation counts alleging libel *per se* and simple negligence on that basis, oblivious to the fact, overwhelmingly apparent from petitioner's motion papers, that each of his defamation counts sought compensation for actual harm consisting *inter alia* of lost earnings and mental suffering.

Even accepting, *arguendo*, the questionable proposition that the subject matter of these libels constituted protected expression on a matter of public concern (see *Ohralik* v. *Ohio State Bar Assoc.*, 436 U.S. 447, 456 56 L.Ed. 2d 444, 453 (1978) listing decisions of this Court holding the exchange of information about securities, corporate proxy statements, price and production information among competitors and similar commercial expressions as subject to regulation without offending the First Amendment), petitioner as a private individual is not required by the First Amendment to establish anything more than simple fault in order to recover damages for actual injury.

That is the holding of *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 41 L.Ed. 789 (1974). ("It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless

disregard for the truth to compensation for actual injury", 418 U.S. at 350).

The Second Circuit considered the rule of the New York Court of Appeals in *Chapadeau* v. *Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 199 (1975), (media defendants must have acted in a grossly irresponsible manner without due consideration for ordinary standards of responsible information gathering and dissemination, before they can be responsible for libel on a matter of public concern) to be an implementation of the constitutional actual malice requirement (20a). The Second Circuit reasoned that this Court's decision in *Dun & Bradstreet, Inc.* v. *Greenmoss Builders*, 472 U.S. 749 86 L.Ed.2d 593 (1985) abolished any constitutional distinction between media and non-media libels insofar as private plaintiff libel claims are concerned and rejected petitioner's contention that only media defendants could require proof of gross irresponsibility as a condition of their liability (21a).

But again, the Second Circuit lost sight of the fundamental proposition that a private libel plaintiff may be permitted by the states to recover damages for actual injury upon a showing of simple fault where the subject matter of the libels is of public concern without offending the First Amendment. Proof of actual malice or gross irresponsibility or satisfaction of any other implementation of the actual malice requirement is not required.

The determination of the Second Circuit that petitioner's actual damage claims must be dismissed because his proof "cannot as a matter of law satisfy the gross irresponsibility standard" (21a), is the product of the application of an incorrect constitutional standard and should be reviewed and corrected by this Court.

III. REVIEW SHOULD BE GRANTED BECAUSE THE SECOND CIRCUIT DISREGARDED THIS COURT'S DIRECTIVES THAT ON MOTIONS FOR SUMMARY JUDGMENT THE NON-MOVANT'S EVIDENCE SHOULD BE BELIEVED AND ALL LEGITIMATE INFERENCES RESOLVED IN HIS FAVOR WHEN IT FAILED TO CREDIT ABUNDANT EVIDENCE FROM WHICH A JURY COULD RETURN A VERDICT THAT RESPONDENTS HAD ACTUAL KNOWLEDGE OF THE FALSITY OF THEIR LIBELS.

Regan was quoted in numerous articles in the public press as stating that petitioner had been fired as a result of the bond trading. Three newspaper reporters testified to the accuracy of these depictions of Regan's remarks and their depositions are in the record. Petitioner, by deposition and affidavit, and Regan by deposition, agreed that petitioner's employment was terminated earlier for reasons unrelated to the bond trading. It was undisputed that petitioner discovered and disclosed the improper trading activities to MMI senior management.

There was uncontradicted deposition testimony that Regan made statements to a *Wall Street Journal* reporter from which a jury could readily infer that he accused petitioner of being among those who concealed the improper trading. In his prepared remarks Regan described the falsification of MMI records to conceal the trading, the deliberate wrongdoing and the fact that the investigation had made it appropriate to terminate certain employees. Thereafter he identified petitioner as one of those discharged. He admitted on deposition that when he spoke on June 8, 1984, and at the time of his deposition, he knew of no evidence tending to suggest that petitioner had known of or participated in the trading activities or in the concealment thereof by falsifying company records or otherwise.

On this record a jury would abundantly be warranted in returning a verdict that Regan had accused petitioner of involvement in the trading and its concealment and of having been discharged as a result thereof with full knowledge of the falsity of his remarks.

Neither the district court nor the Second Circuit addressed these facts.

There was undisputed, unimpeached evidence that respondents refused to issue a reasonable, meaningful corrective statement although same was repeatedly requested. That too is evidence of malice.

The evidence is overwhelmingly sufficient to warrant a jury verdict of knowledge of falsity of their remarks on the part of respondents. This is true under well-settled New York law, *Cohalan* v. *New York Press Co.*, 212 N.Y. 344, 347 (1914); *Crane* v. *Bennett*, 177 N.Y. 106, 113 (1904), *Rabin* v. *Landon*, 38 N.Y.2d 827 (1976), and under this Court's First Amendment "actual malice" requirement. *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279-280, 11 L.Ed. 2d 686, 706 (1964).

Petitioner has been deprived of his fundamental right to trial by jury of the issues of material fact as to the degree of respondent's fault and review should be granted to correct this egregious error.

CONCLUSION

FOR THE REASONS STATED ABOVE, A WRIT OF CERTIORARI SHOULD BE GRANTED TO REVIEW THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

84 Civ. 9185

RICHARD O. POST, JR.,

Plaintiff,

—against—

JOHN M. REGAN, JR. and
MARSH & MCLENNAN COMPANIES, INC.,

Defendant.

MEMORANDUM ORDER

DARONCO, D.J.

This case is before the Court upon a discovery dispute, assertedly engendered by defendants' motion for summary judgment. After considering the parties' submissions, the Court directs that a document identified as a June 6, 1984 memorandum from defendants' attorney be submitted to the Court for *in camera* inspection. Additionally, plaintiff has not shown the necessity or appropriateness of a second deposition of defendant John M. Regan, Jr., and the request for "all documents prepared in connection with the investigation of the corporate defendants' $165 million pre-tax loss brought to light by plaintiff on April 5, 1984 . . .," plaintiff's memorandum of law at 1-2, is overbroad, and accordingly, denied.

SO ORDERED.

DATED: New York, New York
October 20, 1987

/s/ RICHARD J. DARONCO
Richard J. Daronco
U.S.D.J.

The Clerk is directed to mail a copy of this Memorandum Order to counsel for each party.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

84 Civ. 9185

RICHARD O. POST, JR.,

Plaintiff,

—against—

JOHN M. REGAN, JR. and
MARSH & MCLENNAN COMPANIES, INC.,

Defendants.

MEMORANDUM OF DECISION AND ORDER

DARONCO, D.J.

Plaintiff, Richard O. Post, Jr., brings this action against his former employer, Marsh & McLennan Companies, Inc. ("MMC" or the "Company"), an insurance brokerage and consulting business, and its Chairman of the Board of Directors and Chief Executive Officer, John M. Regan, Jr., alleging wrongful termination of his employment and three claims of defamation. Plaintiff's claims for relief arise from the circumstances attendant to MMC's accouncement that plaintiff's employment with MMC was terminated coextensively with the subsequent termination of key employees and its public acknowledgement of $165 million in losses due to unauthorized bond trading. Defendants move for summary judgment, Fed. R. Civ. P. 56(c), on each of the four counts in the Amended Complaint. The material facts relevant to disposition of this Motion are not in dispute.

Background

Plaintiff Post joined MMC's predecessor, Marlennan Corporation, in 1973 as an Assistant Treasurer. Over the next ten years, he served in various capacities and, in early 1983, was named head of the Investment Management Group ("IMG"). In this position he managed all fiduciary and corporate cash of MMC and its operating companies and was responsible for ensuring that investments were made in compliance with relevant state laws and MMC's investment resolution. The investment resolution mandated that investments could not exceed a two-year term without the approval of MMC's Treasurer or Chief Financial Officer and denied Post or any of his subordinates authorization to borrow money to finance bonds. As the head of the IMG, Post reported to Chester A. Gan, the Company's Treasurer, and he supervised Dorothy M. Conway, the chief bond trader, and other members of the IMG.

On or about March 9, 1984, James W.S. Macdonald, Vice President-Finance, and plaintiff agreed that plaintiff's employment with MMC would be terminated. It was further agreed that plaintiff would be given a "reasonable time," specified as until "about the end of June," 1984, in which to seek new employment. Foster Aff., Exh. 11. In the interim, plaintiff was expected to work conscientiously for MMC and, in exchange, would receive his salary and outplacement assistance, and retain his office and secretary.

Plaintiff asserts, and defendants deny, that on or about March 30, 1984, plaintiff and Edward O. Cole, Vice President-Human Resources, agreed that because of problems incurred in Post's job search, his termination date "would be put off indefinitely as necessary until (plaintiff) was able to find new employment." Plaintiff's Rule 3(g) Statement, ¶ 4. Further, plaintiff was to conduct a diligent search for new employment so as to minimize his time on the MMC payroll after June 30, 1984.

Subsequently, on or about April 5, 1984, Richard Wright, an officer of the brokerage firm of Drexel Burnham Lambert Inc. ("Drexel"), advised plaintiff that Conway had taken financed

positions in government bonds which were unauthorized by MMC and invested in bonds with maturity dates beyond those authorized by MMC. Further, Wright observed that MMC was required, but failed, to disclose approximately $350 million in financings at Drexel in its public financial statements. The following day, Post advised his superior, Gan, of MMC's financed position at Drexel. When confronted, Conway verified she had large financed positions at Drexel as well as at other brokerage houses. Defendant Regan was apprised of the situation and an investigation was undertaken by MMC's inside counsel and the accounting staffs of MMC and its subsidiaries, as well as MMC's outside counsel, Wilkie, Farr & Gallagher, and independent auditors.

As the investigation progressed over the next two months, the estimate of the size of the hidden financings and the amount of the concealed losses associated with them increased. As additional information was uncovered, MMC issued press releases, submitted the requisite filings to the Securities and Exchange Commission, and postponed its Annual Meeting of Shareholders so that a complete presentation concerning the losses and the circumstances surrounding them could be made to the shareholders, the investing public and the insurance industry. Eventually, the loss to MMC was determined to be $165 million.

Soon after the initial disclosure of the unauthorized trading, plaintiff alleges, and defendants deny, that Cole, Vice President-Human Resources, instructed plaintiff to stop his search for other employment and to discontinue his outplacement activities while the unauthorized bond trading was being reported in the newspapers. Plaintiff asserts that, to his detriment, he complied with Cole's directives.

On June 8, 1984, Cole summarily notified plaintiff Post that his employment was terminated, effective immediately, and that the support services previously provided were withdrawn. His compensation, however, continued until June 30, 1984.

Later, on June 8, 1984, defendant Regan presided over MMC's adjourned Annual Meeting of Shareholders at which he read prepared written remarks concerning MMC's losses. Regan noted that, unknown to senior management, certain

individuals in the IMG had engaged in unauthorized trading and financing activities and concealed it by entering incorrect investment data into the record-keeping system. Regan stated that the persons doing the unauthorized investing could have been more closely supervised, and consequently, MMC senior management believed it was appropriate to terminate the employment of certain members of IMG and the Company's Treasurer, and had done so. Defendant Regan, however, at this time, did not mention the names of any terminated employees.

After delivering his prepared remarks and responding to shareholders' questions, Regan was informally questioned by reporters. During this brief exchange with reporters, and later by telephone, Regan was asked if Conway, Post and Gan were among those whose employment had been terminated, and he responded affirmatively.* Subsequently, news of MMC's Annual Meeting and its disclosures of $165 million in losses were reported by media throughout the United States, as well as in the London Financial Times. The press coverage, with respect to Post, was limited to the mention of his name as one of those whose employment had been terminated and a statement of the position he had held at MMC.

Discussion

Employment Termination. Employment at-will is for an indefinite period of time and, absent a clear and definite limitation on the employer's right to discharge, the employee may be terminated at any time, without notice, and for any or no cause. *Wright v. Cayan*, 817 F.2d 999 (2d Cir. 1987); *Sabetay v. Sterling Drug, Inc.*, 69 N.Y. 2d 329, 514 N.Y.S. 2d 209, 506 N.E. 2d 919 (1987); *Murphy v. American Home Products, Inc.*, 58

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* The statements made by defendant Regan were republished in, among others, the following media: The New York Times, The Journal of Commerce, The Wall Street Journal, The New York Post, The Washington Post, Business Insurance and The London Financial Times. The leading wire services, Associated Press and United Press International, also disseminated the statements to newspaper, radio and television subscribers throughout the United States.

N.Y. 2d 293, 461 N.Y.S. 2d 232, 448 N.E. 2d 86 (1983). An employer's unfettered right to discharge an at-will employee is not to be impaired by an implied covenant of good faith. *Wakefield v. Northern Telecom, Inc.*, 769 F.2d 109, 112 (2d Cir. 1985).

Relying on *Weiner v. McGraw-Hill, Inc.*, 57 N.Y. 2d 458, 457 N.Y.S. 2d 193, 443 N.E. 2d 441 (1982), (at-will status may be overcome by evidence of an agreement of employment for a fixed duration or a duration capable of determination), plaintiff maintains that, pursuant to the alleged promise of Cole, there was a contractual obligation to allow Post to remain on MMC's payroll, with support services, until he found new employment. Plaintiff argues that "such time as it took him to find new employment" is a duration capable of determination and, therefore, under *Weiner*, there was an express limitation on MMC's right to discharge him. Plaintiff also contends that by wrongfully discharging plaintiff before he found new employment, defendants breached the implied covenant of good faith which attaches to such contractual relations.

The defendants deny plaintiff was promised continued employment with MMC beyond June 30, 1984, or that he was instructed to cease his efforts to obtain new employment at the time the unauthorized bond trading losses were being investigated and reported. Defendants argue that even if Post's allegation that MMC agreed to extend his employment indefinitely until he was able to secure new employment was true, such condition is insufficient to impose an express limitation on MMC's right of discharge.

The Court finds that even assuming *arguendo* an agreement to extend Post's employment, compensation, support services, and outplacement activities until he obtained new employment, such an agreement would be insufficient to negate plaintiff's at-will status. *See Wright*, 817 F.2d 999 (a letter from an employer according an employee a permanent appointment did not create an employment contract of specific duration), *Hunnewell v. Manufacturers Hanover Trust Co.*, 628 F. Supp. 759 (S.D.N.Y. 1986) (employer's statement that employee would be hired through normal retirement age did not sufficiently state a definite term of employment), *Collins v. Hoselton Datsun, Inc.*,

120 A.D. 2d 952, 503 N.Y.S. 2d 203 (4th Dept. 1986) (employee handbook that provided for "job security" did not bar termination of an at-will employee except for cause, when subject of termination not addressed nor susceptible of being interpreted as requiring just cause). The Court notes, also, that implied contractual obligations may coexist with express provisions which appear to negate them where the relationship of the parties, as structured by the contract, so dictates. *Wakefield*, 769 F.2d 109, 112. It strains common sense to suggest an employer would agree to limit his right to discharge for cause an employee already terminated, but allowed to remain on the payroll while seeking alternative employment.

Plaintiff fails to adduce any evidence that MMC expressly agreed to limit its right to terminate Post and, therefore, he remained an at-will employee whose employment was of indefinite duration. Accordingly, defendants' Motion for summary judgment as to the wrongful termination of employment and breach of implied covenant of good faith claims is granted.

Defamation Claims. Plaintiff's three defamation claims differ only in the standard for liability and the type of damages sought: (1) liability without fault, or libel *per se*; (2) liability based on actual knowledge of falsehood or, alternatively, simple negligence; and, (3) liability based on gross irresponsibility "and reckless disregard for the truth" as required for the recovery of punitive damages.

Initially, the Court must determine whether the words complained of are susceptible of the defamatory meaning attributed to them by the plaintiff, and if they are not, innuendo, cannot make them libelous. *Bordoni v. New York Times Company, Inc.*, 400 F. Supp. 1223, 1230 (S.D.N.Y. 1975). Statements are susceptible to defamatory interpretation if they would tend to expose the subject to contempt, aversion or disgrace or induce an evil opinion of him in the minds of reasonable persons, and are false. *See Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y. 2d 369, 379, 397 N.Y.S. 2d 943, 366 N.E. 2d 1299, *cert. denied*, 434 U.S. 969 (1977). The words are to be viewed in context and given their ordinary and usual meaning, *Bordoni*, 400 F. Supp. at 1227, as they would be read and understood by the public to which they are addressed. *November v. Time, Inc.*, 13

N.Y. 2d 175, 244 N.Y.S. 2d 309, 194 N.E. 2d 126 (1963). They are to be read as a whole and with respect to the circumstances of publication. *James v. Gannett Co.*, 40 N.Y. 2d 415, 386 N.Y.S. 2d 871, 353 N.E. 2d 834 (1976).

Plaintiff alleges that defendant Regan defamed him because neither in his remarks at the Annual Meeting of Shareholders nor in later interviews with reporters, did Regan indicate that the agreement to terminate Post's employment had been made prior to the discovery of the unauthorized trading losses; that he was not discharged by reason of involvement in, or knowledge of, the unauthorized bond trading problem; and that, in fact, Post was the person responsible for disclosing the unauthorized trading activities to senior management. Rather, plaintiff contends that taken as a whole and in context, and given their natural and ordinary meaning, Regan's remarks at the shareholders' meeting and his answer to reporters questions, were reasonably understood to

> "accuse plaintiff of being one of the employees who had been dismissed as a result of his role in the unauthorized bond trading and financing which had cost defendant Marsh & McLennan Companies, Inc. a pre-tax loss of approximately $160 million; to declare that plaintiff had participated in the deliberate, fraudulent concealment of such trading by making falsified entries in the record keeping system of the defendant Marsh & McLennan Companies, Inc. such as disguising payments of margin calls as new purchases, and representing next coupon dates as maturity dates; to assert that plaintiff had sought to cover up his participation is unauthorized bond trading and financing and the losses engendered thereby by continuing and expanding such trading; to represent that investigation had shown plaintiff to be equally culpable with Treasurer Chester A. Gan and Assistant Treasurer Dorothy M. Conway for such losses; and to state plaintiff had been 'fired' for those reasons . . . [and to] create the impression that defendants believed plaintiff may have engaged in criminal conduct."

Amended Complaint at 16. Further, plaintiff alleges his status at MMC was a private matter between private parties, not one of public concern, thereby making the defendants strictly liable for the defaming remarks. Due to the alleged defamatory remarks, Post contends he has been unable to obtain employment with any major financial institutions.

Defendants dispute defamation by innuendo and argue that, as evidenced by the $165 million losses due to unauthorized investment activity, Regan's statements were true in that Post certainly did not fulfill his duties and responsibilities as head of the IMG. Defendants contend that a major public corporation's disclosure of a loss of $165 million due to unauthorized trading is a matter of concern to MMC's shareholders, employees, and insurance brokerage clients, whose funds have been entrusted to MMC, as well as to potential investors, and as evidenced by the media interest in the losses and the remedial actions taken by MMC, is a matter of public concern. Therefore, in order to succeed on a defamation claim, the defendants assert plaintiff must demonstrate gross irresponsibility in addition to proving the falsity of defendant Regan's statements.

Standard for Liability. Plaintiff argues this is a defamation action by a private citizen against a corporation in the private sector, whose Chairman falsely accused plaintiff of professional incompetence and fraud. It is plaintiff's position that proof of fault and actual damages are not legal prerequisites to recovery under long established New York libel *per se* decisions, citing *Mencher v. Chesley*, 297 N.Y. 94 (1947); *Kleeberg v. Sipsek*, 265 N.Y. 87 (1934); *Nichols v. Item Publishers*, 309 N.Y. 596 (1956); *Macy v. New York World-Tel Corp.*, 2 N.Y. 2d 416 (1957). Defendants, on the other hand, argue that strict liability for defamation is no longer the law of New York, and, to succeed, plaintiff must prove the defendants were grossly irresponsible and the statements were false. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (states may define for themselves an appropriate standard of liability for a publisher or broadcaster of defamatory statements about a private individual, but there cannot be liability without fault); *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y. 2d 196, 379 N.Y.S. 2d 61, 341 N.E. 2d 569 (1975) (when content is of public concern, standard

for liability is gross irresponsibility without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties); *Pollnow v. Poughkeepsie Newspapers, Inc.*, 107 A.D. 2d 10, 486 N.Y.S. 2d 11 (2d Dept. 1985), *aff'd*, 67 N.Y. 2d 778, 501 N.Y.S. 2d 17, 492 N.E. 2d 125 (1986) (a nonmedia individual defendant who utilizes a public medium for the publication of matter deemed defamatory should be accorded the same constitutional privilege as the medium itself).

The Supreme Court in *Dun & Bradstreet v. Greenmoss Builders, Inc.*, 86 L.Ed 2d 593 (1985), held that fault must be proved where the subject matter of the speech by a non-media defendant is of sufficient public concern to warrant heightened constitutional protection. Both the plaintiff and the defendants acknowledge the widespread publicity given by the media to the reported losses and subsequent personnel actions. *See Gaeta v. New York News, Inc.*, 62 N.Y. 2d 340, 474 N.Y.S. 2d 82, 465 N.E. 2d 802 (1984) (a determination of what constitutes matters of public concern is an editorial function, and is strong evidence that it is of legitimate public interest). As evidence that the statements were of public concern, defendants submit the testimony of news reporters from Business Insurance, The Journal of Commerce, and the Wall Street Journal, who stated they "covered" the Annual Meeting of Shareholders because the bond losses were of public concern, and that the names and positions of personnel terminated in the wake of the disclosures were also of public concern. McLeod dep. at 20-23; Milligan dep. at 14; Smith dep. at 32-33, 42. In response, plaintiff offers no evidence the statements were not of public concern. Rather, he merely avers that the sheer magnitude of the loss cannot transform it into a matter of public concern. But the testimony of the reporters and the newspapers clippings included in the moving papers are evidence that the size of the loss made the events at MMC of public concern.

Upon all the evidence submitted, the Court finds that a loss to a public corporation of $165 million due to unauthorized trading activities and the subsequent remedial actions taken by the corporation widely reported by the media, are of public concern. *See Luisi v. JWT Group, Inc.*, N.Y.L.J., Sept. 18,

1987, at 7, col. 3 (N.Y. Sup. Ct.). Therefore, the standard for liability is gross irresponsibility without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties. *Chapadeau*, 38 N.Y. 2d 196, 379 N.Y.S. 2d 61, 341 N.E. 2d 569; *Pollnow*, 107 A.D. 2d 10, 486 N.Y.S. 2d 11, *aff'd*, 67 N.Y. 2d 778, 501 N.Y.S. 2d 17, 492 N.E. 2d 125. Accordingly, defendants' Motion for summary judgment as to the second and third causes of action is granted.

The court need not decide whether Regan's remarks are susceptible to a defamatory interpretation, because defendants' Motion can be decided on other grounds. Even if the statements are found to be defamatory, in order to succeed, the plaintiff must show that the defendants conducted and reported the results of their investigation in a grossly irresponsible manner. *See Luisi*, N.Y.L.J., Sept. 18, 1987. Defendants have come forward with admissible evidence that the investigation and subsequent reporting were conducted in a careful, responsible manner. The investigation was conducted over a two-month period, and was not done hastily. It involved interviews of relevant parties and reviews of transactions and documents by inside and outside counsel, by staff and independent accountants, as well as by senior management. The prepared remarks were reviewed by those same parties. In opposition, plaintiff submitted Regan's testimony that the termination on June 8, 1984 was a confirmation of the decision made in early March to terminate Post. This, however, is not inconsistent as MMC did not relinquish its right to terminate plaintiff for cause prior to June 30, 1984. The fact that Post was not a party to the concealed, unauthorized trading is irrelevant as he was charged with the reponsibility of enforcing MMC's investment resolutions and complying with relevant state laws. Regan merely stated that as a result of the investigation, senior management agreed that it was appropriate to take certain actions regarding personnel, and that Post was one of the key personnel terminated. To conclude by innuendo from this that Post was an active participant in the unauthorized activity "stretch(es) an innuendo beyond its outer limits," and is unwarranted. *Bordoni*, 400 F. Supp. at 1230. It seems appropriate to conclude the

employment period of an employee, especially one already terminated, who is charged with responsibility for the conduct of his subordinates, where the conduct was outside the scope of company policy and led to losses of $165 million.

The Court finds that, based on the entire record, neither Regan nor MMC acted in a grossly irresponsible manner, and plaintiff has not, by a preponderance of the evidence, shown that they did. As plaintiff cannot demonstrate gross irresponsibility, it follows he cannot meet the higher standard of actual malice. Accordingly, defendants' Motion for summary judgment as to the fourth claim is granted.

Based on the foregoing, the defendants' Motion for summary judgment is granted in its entirety and the Complaint is dismissed.

The Clerk is directed to enter judgment accordingly, and to forward a copy of this Order to counsel for each party.

SO ORDERED.

DATED: New York, New York
January 15, 1988

/s/ RICHARD J. DARONCO
Richard J. Daronco
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

84 Civ. 9185 RJD

RICHARD O. POST, JR.,

Plaintiff,

—against—

JOHN M. REGAN, JR. and
MARSH & MCLENNAN COMPANIES, INC.,

Defendants.

JUDGMENT

Defendant(s) having moved for summary judgment and the said motion having come before the Honorable Richard J. Daronco, U.S.D.J., and the Court thereafter on January 20, 1988, having handed down its memorandum decision and order, granting the said motion in its entirety; dismissing the complaint and directing the Clerk to enter judgment accordingly, it is,

ORDERED, ADJUDGED AND DECREED: That the complaint be and it is dismissed.

DATED: New York, N.Y.
January 22, 1988

/s/ RAYMOND F. BURGHARDT
Raymond F. Burghardt
Clerk

THIS DOCUMENT WAS ENTERED ON THE
DOCKET ON 1-26-88

[Letterhead of Walker & Corsa]

February 10, 1988

Hon. Richard J. Daronco
United States District Judge
United States Courthouse
Foley Square
New York, New York 10007

Re: Post v. John M. Regan, Jr.
and Marsh & McLennan Companies, Inc.
84 Civ. 9185 (RJD)
Our File: 963-1

Honorable Sir:

We are the attorneys for plaintiff in this libel and breach of contract action in which counterclaims have been interposed by the corporate defendant.

As Your Honor will recall, the Court has granted defendants' motion for summary judgment dismissing the four counts of the amended complaint by memorandum order and decision dated January 15, 1988, filed January 20, 1988, with the Clerk of the Court entering judgment dismissing the complaint on the docket on January 27, 1988.

We have recommended and have been authorized to prosecute an appeal. We write to respectfully request that Your Honor issue a "certificate" in accordance with Rule 54(b) of the Federal Rules of Civil Procedure, including Rule 54(b) language to the effect that the court has directed the entry of final judgment dismissing the complaint and has determined that there is no just reason for delay. Our adversaries we understand have no objection to our request to the Court.

Your Honor's issuance of a "certificate" will remove any questions as to appealability at this stage of the proceedings,

and, it is respectfully submitted, conserve the time of court and counsel by obviating either an unnecessary trial of the counterclaims if your decision is affirmed, or two separate trials in the same case, if your decision is reversed.

Very truly yours,

WALKER & CORSA

BY: CHARLES L. TROWBRIDGE
Charles L. Trowbridge

CLT:vc
cc: David L. Foster, Esq.
Willkie, Farr & Gallagher
One Citicorp Center
153 East 53rd Street
New York, New York 10022

Upon the parties' joint application, as contained herein, the Court finds that there is no just reason for delay and directs the Clerk, pursuant to Fed.R.Civ.Pro. 54(b), to enter a final judgment dismissing the complaint.

SO ORDERED.

Dated: New York, New York
February 22, 1988

/s/ RICHARD J. DARONCO
Richard J. Daronco,
U.S.D.J.

The Clerk is directed to forward a copy of this indorsement to counsel for each party.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

88-7260

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the Twenty-Seventh day of June one thousand nine hundred and eighty-eight.

Present: HONORABLE JON O. NEWMAN,
HONORABLE AMALYA L. KEARSE,
HONORABLE RICHARD J. CARDAMONE
Circuit Judges.

RICHARD O. POST, JR.,

Plaintiff-Appellant,

—v.—

JOHN M. REGAN, JR. and
MARSH & MCLENNAN COMPANIES, INC.,

Defendants-Appellees.

ORDER

Richard O. Post, Jr. appeals from a judgment of the District Court for the Southern District of New York (Richard J. Daronco, Judge) dismissing his action for wrongful termination of employment and defamation against his former employer, Marsh & McLennan Companies, Inc. ("MMC"), and its Chairman and Chief Executive Officer, John M. Regan, Jr. Post

contends that the District Court erred in granting summary judgment on the wrongful termination claim because a jury reasonably could have concluded that he enjoyed something more than at-will employment status based on representations by MMC that Post would have a "reasonable" time in which to obtain a new position before his termination took effect. Post contends that summary judgment was also inappropriate on his second, third, and fourth claims, which alleged alternative theories of defamation stemming from the defendants' public announcement of his termination in connection with unauthorized trading activities at MMC. We reject these contentions and affirm.

1. *Wrongful Termination of Employment.* New York law does not recognize an implied covenant of good faith in employment contracts. *See Sabetay v. Sterling Drug, Inc.*, 69 N.Y.2d 329, 335, 514 N.Y.S.2d 209, 212 (1987); *Murphy v. American Home Products Corp.*, 58 N.Y.2d 293, 304-05, 461 N.Y.S.2d 232, 237 (1983). Instead, the Court of Appeals has adhered to the long-settled rule that "where an employment is for an indefinite term it is presumed to be a hiring at will which may be freely terminated by either party at any time for any reason or even for no reason." *Murphy v. American Home Products Corp.*, *supra*, 58 N.Y.2d at 300, 461 N.Y.S.2d at 235 (citations omitted). *See Sabetay v. Sterling Drug, Inc.*, *supra* (discussing strictness of New York rule); *Martin v. New York Life Insurance Co.*, 148 N.Y. 117 (1895).

In *Murphy*, after noting the general requirement that an employment contract must expressly establish a term of fixed duration in order to avoid at-will status, the New York Court of Appeals acknowledged an additional ground that would support an action on the contract: "Of course, if there were an express limitation on the employer's right of discharge it would be given effect even though the employment contract was of indefinite duration." 58 N.Y.2d at 305, 461 N.Y.S.2d at 237. *See Wright v. Cayan*, 817 F.2d 999, 1003 (2d Cir.), *cert. denied*, 108 S. Ct. 157 (1987). This rule is illustrated by the Court of Appeals holding in *Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d 458, 457, N.Y.S.2d 193 (1982), in which plaintiff was permitted

to sue on his employer's express assurance, contained in numerous memoranda, that he would not be terminated without just cause.

Appellant's attempt to enlist *Weiner* in his effort to avoid summary judgment in the pending case is unavailing. At best, the factual allegations tend to prove only that after the decision was made in March that Post's employment with MMC would end, Post was told on two occasions by Edward Cole, an MMC Vice President, that he would be retained with pay until June 30, 1984, or a reasonable time thereafter, in order to facilitate Post's transition. Post in fact received compensation from MMC through June 30, 1984. Any claim to a contractual right to employment beyond that date is groundless. The alleged assurances by Cole that the June 30 termination date was flexible and would be extended, if necessary, were a gratuitous accommodation; they fail to satisfy the requirement of an express limitation on the employer's right of termination, either by providing a fixed term of employment or a promise that termination would be only for cause. *See Wright v. Cayan*, *supra*, 817 F.2d at 1003 (assurance of "permanent appointment" does not limit employer's right to terminate); *Hunnewell v. Manufacturers Hanover Trust Co.*, 628 F. Supp. 759, 760 (S.D.N.Y. 1986) (promises to employ plaintiff for "full working life" and "through normal retirement age" do not create express term of employment).

Finally, Post's analogy to the "detrimental reliance" shown in *Weiner* is unpersuasive. First, Post cites no authority for the proposition that reliance itself, absent an express limitation on the power to terminate, will defeat at-will status. Moreover, the reliance in that case is of a wholly different character than that alleged here. The plaintiff in *Weiner* was induced to leave his prior job upon the assurance that he would not be terminated without cause and rejected other offers of employment in reliance on that written assurance. Post merely alleges that he broke off talks with a potential employer at the request of Cole when the unauthorized transactions were discovered "in order to avoid interviewing during this sensitive period." Affidavit of Richard O. Post, Jr. at 43, Joint Appx. at 461. Cole's request, even if coupled with a statement that Post would be given more

time to search for a job later, only serve to illustrate the *absence* of any fixed term of employment specified for Post during this period of crisis and flux at MMC.

2. *Defamation.* As an initial matter, we agree with the District Court that the appellees' allegedly defamatory speech undoubtedly addressed a matter of "public concern" sufficient to trigger heightened constitutional protections. *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 756 (1985); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Appellees' speech disclosed details concerning "a loss to a public[ly traded] corporation of $165 million due to unauthorized trading activities and the subsequent remedial actions taken by the corporation widely reported by the media." 677 F. Supp. at 208. No one familiar with events on Wall Street in recent years can accept appellant's characterization of appellees' speech as concerning matters of purely private interest. The "commercial" subject matter itself does not automatically divest the speech of its public importance. *Cf. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., supra*, 472 U.S. at 758 n.5, 762 (discussing constitutional hierarchy of speech categories). The fiscal and ethical integrity of this country's large financial institutions is a matter of grave public importance and concern.

Because a state may not allow recovery of presumed and punitive damages "absent a showing of 'actual malice' " in a defamation action where the challenged expression related to a matter of public concern, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., supra*, 472 U.S. at 756 (discussing holding of *Gertz v. Robert Welch Inc., supra*), the District Court properly dismissed Post's defamation counts alleging libel *per se* and simple negligence. Under New York law implementing the constitutional restraints reflected in the "actual malice" standard, a plaintiff may recover only if the defendants "acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties." *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 199, 379 N.Y.S.2d 61, 64 (1975).

Appellant contends that the New York courts use the *Chapadeau* standard only in defamation actions involving "media defendants," and argues that some lesser though unspecified standard is applicable to the "non-media" defendants in the pending case. This contention is flawed in two respects. Most importantly, the *Dun & Bradstreet* decision unequivocally indicates that the critical issue in determining the required standard for recovery of presumed or punitive damages is whether the subject matter of the speech is one of public concern. The inquiry focuses on the subject matter of the expression, not the identity of the speaker. Secondly, New York has applied the *Chapadeau* standard to non-media defendants. *See Pollnow v. Poughkeepsie Newspapers, Inc.*, 107 A.D.2d 10, 486 N.Y.S.2d 11 (2d Dep't 1985), *aff'd*, 67 N.Y.2d 778, 501 N.Y.S.2d 17 (1986) (gross irresponsibility standard used where non-media defendant's speech published as "letter to editor" involved matter of public concern); *Luisi v. JWT Group, Inc.*, N.Y.L.J., Sept. 18, 1987, at 7, col. 3 (N.Y. Sup. Ct.), *aff'd mem.*, ____ A.D.2d ____, 525 N.Y.S.2d 454 (1st Dep't 1988). The liability standard applied to the appellees' motion for summary judgment was correct.

Finally, we agree that summary judgment was appropriate on the facts of this case. A careful and responsible investigation into the unauthorized trading affair was conducted by MMC with the aid of outside counsel and an independent accounting firm. MMC concluded that the unauthorized transactions resulted from the unethical (and perhaps criminal) conduct of a small number of its employees, coupled with inadequate supervision by those charged with that responsibility. Post fell into this latter group. It is true, as Post claims, that his name was mentioned to reporters as one of those discharged without any distinction being made between the alleged wrongdoers and their supervisors and without disclosure of the fact that Post had plans, before the unauthorized trading was discovered, to leave MMC for apparently unrelated reasons at some unspecified future date. Even if a defamatory interpretation can be given to Regan's speech and his subsequent comments to reporters, however, these factual omissions cannot as a matter of law satisfy the gross irresponsibility standard. Appellees

were not required to specify as to each discharged employee the precise degree of culpability involved. Nor is the fact that Post had plans to leave MMC before discovery of the unauthorized transactions relevant to the circumstances under which he was (by his own characterization) prematurely terminated once the transactions were revealed.

Appellant's contention concerning inadequate discovery is without merit, as is his claim that the District Court relied on privileged material in dismissing the action, *see* 677 F. Supp. at 209 ("Defendants have come forward with *admissible* evidence that the investigation and subsequent reporting were conducted in a careful, responsible manner." (emphasis added)).

The judgment of the District Court is affirmed.

/s/ JON O. NEWMAN

/s/ AMALYA L. KEARSE

/s/ RICHARD J. CARDAMONE
Circuit Judges.

N.B. This Summary Order will not be published in the Federal Reporter and Should not be cited or otherwise relied upon in unrelated cases before this or any other court.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the Sixth day of September one thousand nine hundred and eighty-eight.

RICHARD O. POST, JR.,

Plaintiff-Appellant,

—v.—

JOHN M. REGAN, JR. and
MARSH & MCLENNAN COMPANIES, INC.,

Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiff-appellant, Richard O. Post.

Upon consideration by the panel that heard the appeal, it is ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to judges of the court in regular active service and to any other judge that heard the appeal and no such judge has requested that a vote be taken thereon.

/s/ ELAINE B. GOLDSMITH
Elaine B. Goldsmith,
Clerk

STATUTORY PROVISIONS

Fed. Rule Civ. Proc. Rule 26(b)(3) states in pertinent part as follows:

Rule 26. General Provisions Governing Discovery

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(3) ***Trial Preparation: Materials.*** Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation ot the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital

of an oral statement by the person making it and contemporaneously recorded.

Fed. Rule Civ. Proc. Rule 56, 28 U.S.C.A. states in pertinent part as follows:

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial contro-

versy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I states in pertinent part as follows:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . .

U.S. Const. amend. V states in pertinent part as follows:

> . . . nor be deprived of life, liberty, or property, without due process of law . . .

U.S. Const. amend. XIV § 1 states in pertinent part as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.